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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-568

WHITE & CASE and MARION JAY EPLEY, III,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

REPLY MEMORANDUM OF PETITIONERS WHITE & CASE AND MARION JAY EPLEY, III, IN SUPPORT OF PETITION FOR CERTIORARI

MILTON V. FREEMAN
ABE KRASH
DANIEL A. REZNECK
LAWRENCE A. SCHNEIDER

ARNOLD & PORTER
1229 19th St. N.W.
Washington, D.C. 20036

Attorneys for Petitioners White & Case and Marion Jay Epley, III

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What the SEC calls a "preliminary technical issue" (SEC Brief at 11) is a matter of fundamental procedural fairness.

In all the many briefs which it has submitted in the Courts below and now in this Court, the SEC has never answered the simple question: Why were White & Case and Mr. Epley not notified that they were the targets of the SEC investigation and given an opportunity to present their side of the matter to the Commission before they were sued? The SEC has never advanced a single reason to justify concealing from a lawyer acting in a representative capacity on behalf of clients in an investigation the fact

that he is in personal jeopardy and should take steps to protect both his clients' interests and his own.

Circuit Judge McGowan did not regard the matter as a "preliminary technical issue." He said that "problems of procedural fair play swarm around the question" of how the SEC staff behaved toward the lawyers in the present case. (Petition for Certiorari, Appendix A, p. 7a)

The SEC is wrong that the issue raised by petitioners need not be resolved "at this preliminary stage of the litigation." (SEC Brief at 9). This case is awaiting a protracted trial of some months' duration, which will require the expenditure of vast amounts of judicial time and enormous sums of money—all totally unnecessary if we are correct that suit was unlawfully instituted because of the SEC staff's disregard of the agency's own regulation.

This Court has repeatedly held that when an issue or ruling below is "fundamental to the further conduct of the case", it is appropriate for immediate review so as to avoid unnecessary burdens on the judicial system and the litigants. *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); *see Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Laird* v. *Tatum*, 408 U.S. 1 (1972); *Mills* v. *Electric Auto-Lite*, 396 U.S. 375, 381 (1970).

The present case should never have been brought. The issue we raise is potentially dispositive. The Courts below have both found that immediate decision may "materially advance the ultimate termination of the litigation." (App. 165)

The SEC is also wrong in its bizarre contention that review should be denied because the "damage has already

been done" by institution of the lawsuit. (SEC Brief at 10). To the contrary, the damage to petitioners' reputation and professional standing continues every day that this unjust suit remains pending.

The notion that the SEC's failure to publish its regulation allows the staff to violate it with impunity (SEC Brief at 11-12) runs counter to the purpose of the doctrine of *Service* v. *Dulles*, 354 U.S. 363 (1957), and *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). The *Service-Accardi* doctrine is intended to "prevent the *arbitrariness which is inherently characteristic of an agency's violation of its own procedures.*" *United States* v. *Heffner*, 420 F.2d 809, 812 (4th Cir. 1969) (Emphasis supplied). The point is that an agency must deal with all persons subject to its jurisdiction on an equal basis. The fact of publication is irrelevant to whether the *Service-Accardi* principle has been observed.

The SEC asserts that petitioners have no complaint because "they will have a full opportunity to vindicate their conduct" at trial and therefore cannot show "prejudice" under the *Service-Accardi* doctrine, even if the suit was illegally brought. (SEC Brief at 11, 13). The short answer is that this would excuse total disregard or arbitrary application by the Commission of a rule predicated on elementary concepts of fairness.

It is well settled that a person is entitled to have his day *before the agency,* in accordance with the procedures established by the agency. The opportunity for vindication in a subsequent court proceeding does not cure or render harmless a violation of the *Service-Accardi* principle. This is so even though the agency might have reached the same result had it followed its own procedures.

Thus this Court held in *Accardi* that a person who had been denied a fair hearing in violation of agency procedures was entitled to such a hearing although he might still fail to convince the agency; "at least he will have been afforded that due process required by the regulations in such proceedings." 347 U.S. at 268.

This Court reached the same result with respect to a violation by a Congressional committee of its own rules in *Yellin* v. *United States,* 374 U.S. 109 (1963). It held:

> "Although the Court recognized that Accardi might well lose [before the agency] . . . it nonetheless held that Accardi should at least have the chance given him by the regulations. The same result should obtain in the case at bar. Yellin might not prevail, even if the Committee takes note of the *risk of injury to his reputation* or his request for an executive session. *But he is at least entitled to have the Committee follow its rules and give him consideration according to the standards it has adopted . . . .*" *Id.* at 121 (Emphasis supplied.)

If the *Service-Accardi* doctrine is now to be fundamentally recast and curtailed, only this Court can do so. The petition should be granted.

Respectfully submitted,

MILTON V. FREEMAN
ABE KRASH
DANIEL A. REZNECK
LAWRENCE A. SCHNEIDER

ARNOLD & PORTER
1229 19th St. N.W.
Washington, D.C. 20036

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